1.2 General Discrimination: Mixed Motive

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Introductory Note

It is clear that in the early stages of litigation a plaintiff may proceed simultaneously on both a McDonnell Douglas pretext case and a Price Waterhouse mixed motive case. See, e.g., Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 434 (1st Cir. 2000) (ADEA) (Lynch, J.) (quoting approvingly Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 581 (1st Cir. 1999) (Title VII) (Selya, J.)). What happens at the jury instruction stage, however, is problematic. Judge Selya has said quite clearly that "the trial court, at an appropriate stage of the litigation, will channel the case into one format or the other." Fernandes, 199 F.3d at 581; see also Dominguez-Cruz, 202 F.3d at 434 (citing Fernandes for the same proposition). The logical implication is that a jury will not be charged simultaneously on both theories. But in Febres v. Challenger Caribbean Corp., 214 F.3d 57, 64 & n.9 (1st Cir. 2000) (ADEA), Judge Selya said that the trial judge there had instructed on both theories "and we express no opinion on the practice."

The problem is this. A plaintiff is entitled to a mixed motive instruction only if he or she has "direct" evidence of discrimination or, as Judge Selya has said, in "those infrequent cases in which a plaintiff can demonstrate with a high degree of assurance that the employment decision of which he complains 'was the product of a mixture of legitimate and illegitimate motives.'" Fernandes, 199 F.3d at 580. The First Circuit has said: "We need not get into the question of whether mixed-motive analysis is available on strong circumstantial evidence of discrimination," Patten v. Wal-Mart Stores East, Inc., 300 F.3d 21, 25 n.1 (1st Cir. 2002), and has explicitly refused on several occasions to define what is direct evidence. Febres, 214 F.3d at 60 ("[T]he courts of appeals are in some disarray as to what constitutes direct evidence sufficient to provoke a mixed motive instruction . . . [but] [w]e need not draw overly fine distinctions today."); Fernandes, 199 F.3d at 581-83 (outlining possible definitions of "direct evidence" and noting that "the question [of the definition of direct evidence] is wide open in this circuit"); see also Weston-Smith v. Cooley Dickinson Hosp., Inc., 282 F.3d 60, 65 (1st Cir. 2002) (Title VII) (Lynch, J.). It is therefore hard to see how a trial judge can confidently charge a jury on what is direct evidence. But the First Circuit has also said that the burden shifts in a mixed motive case only if the jury "accepts the 'direct evidence' . . . and draws the inference that the employer used an impermissible criterion in reaching the disputed employment decision." Febres, 214 F.3d at 64. Thus, if both a pretext and a mixed motive theory are going to the jury simultaneously, unless a trial judge is able to provide a definition of the term "direct" evidence, he or she must list each item of direct evidence and ask the jury in a special interrogatory whether it believes the enumerated items. (Presumably the trial judge must also tell the jury which of the items alone or in combination are sufficient to support the burden shift.) This seems unnecessarily complex and risks undue comment on the evidence in the sense that it will undoubtedly focus the jury's attention on certain portions of the evidence to the exclusion of others. The alternative is to take at face value Judge Selya's Fernandes statement that the trial court is to channel the case into one format or the other, and ignore his later Febres diffidence. On that basis, once a trial judge is satisfied that there is enough direct evidence in the case to support the mixed motive instruction, he or she would charge solely on Price Waterhouse, not

distinguishing for the jury between circumstantial and direct evidence. That approach is not entirely consistent theoretically with the premise for determining which cases go to the jury on the mixed motive instruction, but it is more practical.

For these reasons, this instruction does not distinguish between direct and indirect evidence, or give alternative Price Waterhouse / McDonnell Douglas instructions. See Dominguez-Cruz, 202 F.3d at 429-30 ("In fact, one might question whether these bright lines [between direct and indirect evidence] are so helpful in the end. . . . In appeals after trial, this and other courts have recognized the need for flexibility and have sometimes bypassed these approaches and instead looked at whether the totality of the evidence permits a finding of discrimination." (citations omitted)).

Pattern Jury Instruction

[Plaintiff] accuses [defendant] of [protected characteristic][12] discrimination. Specifically, [he/she] claims that [defendant] took adverse employment action against [him/her] because of [protected characteristic] discrimination.[13]

[14]{An "adverse employment action" is one that, standing alone, actually causes damage, tangible or intangible, to an employee. The fact that an employee is unhappy with something his or her employer did or failed to do is not enough to make that act or omission an adverse employment action.[15] An employer takes adverse action against an employee only if it: (1) takes something of consequence away from the employee, for example by discharging or demoting the employee, reducing his or her salary, or taking away significant responsibilities; or (2) fails to give the employee something that is a customary benefit of the employment relationship, for example, by failing to follow a customary practice of considering the employee for promotion after a particular period of service.[16]}

In order to succeed on this claim, [plaintiff] must first persuade you, by a preponderance of the evidence, that [her/his] [protected characteristic] was a motivating factor[17] in [defendant]'s decision to [specify adverse action].[18]

To prove that [protected characteristic] was a "motivating factor," [plaintiff] must show that it played a nontrivial role[19] in [defendant]'s decision to [specify adverse action]. [Plaintiff] need not show that [protected characteristic] discrimination was the only[20] reason [defendant] [specify adverse action]. But [she/he] must show that [defendant] relied upon [protected characteristic] discrimination in making its decision.[21]

If you find that [plaintiff] has not proven by a preponderance of the evidence that [plaintiff]'s [protected characteristic] played a more than trivial role in [specify adverse action], your verdict must be for the defendant.

But if you find that [plaintiff] has proven by a preponderance of the evidence that [his/her] [protected characteristic] was a motivating factor in [defendant]'s decision to [specify adverse action], then the burden of proof shifts to [defendant] to prove by a preponderance of the

evidence[22] that it would nevertheless have taken the same action even if it had not considered [plaintiff]'s [protected characteristic].[23]

If you find that [defendant] has not met its burden of proof, your verdict will be for the [plaintiff] and you will proceed to consider damages as I will describe them. But if you find that [defendant] has proven that it would have taken the same action regardless of [plaintiff]'s [protected characteristic], you will not consider damages.

I have prepared a special verdict form to assist you in addressing these issues.[24]

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[12] This instruction is designed for race, color, national origin, religion, sex, pregnancy or age discrimination cases. The ADEA's prohibition against age discrimination is limited to "individuals who are at least 40 years of age." 29 U.S.C. § 631(a) (2001). The Introductory Notes at the beginning of these instructions outline the statutory basis for each of these claims.

For sexual harassment cases, see Instructions 2.1-2.3. For disability discrimination cases, see Instruction 3.1. For Equal Pay Act cases, see Instruction 4.1. For retaliation cases, see Instruction 5.1.

[13] The following sentence may be used in a pregnancy discrimination case:

> Under federal law, employers must treat women affected by pregnancy the same, for all employment-related purposes, as other persons not affected by pregnancy but similar in their ability or inability to work. Concern for their safety or that of their unborn children is no justification for different treatment. Safety is a justification only when pregnancy actually interferes with an employee's ability to perform her job.

See International Union, United Auto., Aerospace and Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) (Title VII) (Blackmun, J.) ("Our case law, therefore, makes clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job.").

In Chevron U.S.A. Inc. v. Echazabal, 122 S. Ct. 2045 (2002), the Supreme Court held that, under the ADA, concern for an employee's own health is a permissible criterion in employee screening. In light of Johnson Controls, any policy seeking the benefit of Chevron would have to be facially neutral, and not single out pregnant women. See also Smith v. F.W. Morse & Co., 76 F.3d 413, 424-25 (1st Cir. 1996) ("At bottom, Title VII requires a causal nexus between the employer's state of mind and the protected trait (here, pregnancy). The mere coincidence between that trait and the employment decision may give rise to an *inference* of discriminatory animus, but it is not enough to establish a per se violation of the statute. . . ." (internal citation omitted)).

[14] This bracketed paragraph may be used in cases where there is a dispute about whether the action that the defendant allegedly took against the plaintiff constituted an adverse employment action. Although this question, if it arises, is one for the jury, see Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (Boudin, C.J.) (jury could find that plaintiff who was given a raise but assigned less challenging, largely menial responsibilities suffered an adverse employment action), in most cases the dispute will be about whether the defendant's challenged conduct was motivated by discriminatory animus, not whether it amounted to an adverse employment action. If there is no dispute about whether the alleged conduct, if proven, would constitute an adverse employment action, the bracketed paragraph may be deleted and the words "took adverse employment action against" in the second sentence of the first paragraph may be replaced by a brief description of the adverse employment action defendant allegedly took.

[15] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA) (Selya, J.) ("[T]he inquiry must be cast in objective terms. Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.").

Blackie uses the term "materially adverse employment action," but does not define the term (or, more precisely, the significance of the word "materially") beyond what is included in the text of this instruction. Two other cases also use the modifier "materially" when discussing adverse employment actions (both cases take the language from Blackie), but neither of these cases indicates that a materially adverse employment action is different from an adverse employment action. Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 49-50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (Cyr, J.) (applying Title VII definition of adverse employment action); Larou v. Ridlon, 98 F.3d 659, 663 n.6 (1st Cir. 1996) (First Amendment political

discrimination) (Cyr, J.) (applying, with reservation, Blackie definition of adverse employment action). Furthermore, none of these three cases uses the term "materially adverse employment action" exclusively; all three cases describe employment actions as "materially adverse" and "adverse" interchangeably. Other employment discrimination cases decided after Blackie have referred to adverse employment action without the modifier "materially." See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 33 (1st Cir. 2001) (Title VII and section 1981) (Cyr, J.); Suarez v. Pueblo Int'l, Inc., 229 F.3d 49, 53-54 (1st Cir. 2000) (ADEA) (Selya, J.); White v. New Hampshire Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII) (Bownes, J.).

[16] Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996) (FLSA) (Selya, J.). As the Blackie court noted, this definition is generalized because "[d]etermining whether an action is materially adverse necessarily requires a case-by-case inquiry." Id. Consequently, although there is little explicit guidance in the case law about what constitutes an adverse employment action, there are a number of cases that, by their factual holdings, help define the term. For example, in the majority of cases, the court does not explicitly analyze whether the challenged conduct constitutes an adverse employment action, presumably because certain actions, such as layoffs, salary reductions, and demotions, are generally recognized as adverse employment actions. See, e.g., Straughn v. Delta Air Lines, Inc., 250 F.3d 23 (1st Cir. 2001) (Title VII and section 1981) (Cyr, J.) (termination); Rodriguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15 (1st Cir. 1999) (Title VII) (Torruella, C.J.) (demotion); Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) (salary reduction); see also Welsh v. Derwinski, 14 F.3d 85, 86 (1st Cir. 1994) (ADEA) (Per Curiam) ("Most cases involving a retaliation claim are based on an employment action which has an adverse impact on the employee, i.e., discharge, demotion, or failure to promote."). More helpful, though, are the cases where the court decided whether a jury could reasonably find that the challenged actions constitute adverse employment actions. In some cases, the court has defined what actions are insufficient to constitute an adverse employment action by upholding a trial court's conclusion that the defendant's conduct was not, as a matter of law, actionable. See, e.g., Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) (Title VII) (Schwarzer, Sr. Dist. J., N.D. Cal.) (plaintiff was subjected to increased email messages, disadvantageous assignments and "admonition that [he] complete his work within an eight hour [day]"); Blackie, 75 F.3d at 726 (plaintiffs claimed defendants refused to negotiate a "side agreement" to supplement their employment contract); Connell v. Bank of Boston, 924 F.2d 1169, 1179 (1st Cir. 1991) (ADEA) (Campbell, J.) (plaintiff who had already been fired and whose severance package was already calculated was forced to leave office two weeks early). In another useful class of cases, the court held that the challenged employment action could constitute an adverse employment action by either upholding a jury verdict for the plaintiff, see, e.g., White v. New Hampshire Dep't of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (Title VII) (Bownes, J.) ("ample evidence" of adverse employment action where plaintiff was harassed, transferred without her consent, not reassigned to another position, "and ultimately constructively discharged"), or holding that the defendant was not entitled to summary judgment on this issue. See, e.g., Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc., 273 F.3d 30, 36 (1st Cir. 2001) (ADEA) (Boudin, C.J.) (plaintiff given standard salary increase but assigned less challenging, largely menial responsibilities); DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) (Title VII) (Bownes, J.) (plaintiff given five month assignment to job for which he had no experience and deprived of meaningful duties); Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (Title VII) (Boudin, J.) (defendant refused to grant plaintiff a hardship transfer); see also Simas v. First Citizens' Federal Credit Union, 170 F.3d 37, 48, 50 (1st Cir. 1999) (Federal Credit Union Act; whistleblower retaliation) (Cyr, J.) (plaintiff given negative performance evaluations and deprived of responsibility for major account) (applying Title VII definition of adverse employment action).

[17] 42 U.S.C. § 2000e-2(m) (2001) ("an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"); Febres v. Challenger Caribbean Corp., 214 F.3d 57, 60 (1st Cir. 2000) (ADEA) (Selya, J.) ("a proscribed factor . . . played a motivating part in the disputed employment decision"); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999) (Title VII) (Selya, J.) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989) (Title VII) (Brennan, Jr., plurality)) (Price Waterhouse standard applies where the challenged employment decision was "the product of a mixture of legitimate and illegitimate motives").

[18] The following sentence may be used in age discrimination cases where the defendant argues that the challenged employment decision was based on a factor, other than age, that is often associated with age or is correlated with age, such as seniority or pension status:

> A defendant is entitled to base an employment decision on a factor other than age, such as seniority, even if that factor is often correlated with age, as long as

> the defendant is not using that other factor as a pretext to hide age discrimination.

Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) (ADEA) (O'Connor, J.) ("When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is."); see also id. ("Yet an employee's age is analytically distinct from his years of service."); Bramble v. American Postal Workers Union, 135 F.3d 21, 26 (1st Cir. 1998) (ADEA) (Torruella, C.J.) (union that reduced union president's salary based on president's status as a retiree did not discriminate because, although "there is a positive correlation between active pay status and age, … one is not an exact proxy for the other").

[19] The meaning of "motivating factor" in a mixed motive instruction is still problematic. In Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999) (Title VII), Judge Selya stated that a plaintiff must show that the illegitimate factor played a "substantial role" or "placed substantial negative reliance on an illegitimate criterion." This use of the word "substantial" comes from Justice O'Connor's separate concurrence in Price Waterhouse. 490 U.S. 228, 275, 277 (1989) (Title VII) (O'Connor, J., concurring). She used the term throughout her opinion to distinguish her position from the Brennan plurality (and Judge Selya has said that the O'Connor concurrence is the opinion that ought to guide the courts in this Circuit. Fernandes, 199 F.3d at 580.) Justice Brennan used the term "a motivating factor" and wrote that there was no meaningful difference in the plurality's test from O'Connor's concurrence. 490 U.S. at 250 n.13. That statement is consistent with the Court's earlier use of the term in a case involving employment termination for protected speech. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (First and Fourteenth Amendment discrimination) (Rehnquist, J.) ("conduct was a 'substantial factor' or to put it in other words, . . . it was a 'motivating factor'"; if the plaintiff proves that, the defendant can still escape liability by showing it would have taken the same action regardless). But Justice O'Connor disagreed. 490 U.S. at 277-78. Justice O'Connor did not define the term "substantial" in any way that could be used by a jury. She did seem concerned that, without some limitation, stray remarks or random sexist terminology might inappropriately be thought to satisfy the test of "a motivating factor" because a factfinder might think they "play a role" and for her that was too weak because "[r]ace and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion." Id. at 277. According to Justice O'Connor, something is "substantial" if "as an evidentiary matter, a reasonable factfinder could conclude that absent further explanation, the employer's discriminatory motivation 'caused' the employment decision," id. at 265; "the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made 'because of' the plaintiff's protected status." Id. at 278. This use of the term "substantial" in a prima facie sense is related to but subtly and importantly different from its general use in tort causation. As the Restatement (Second) of Torts explained:

> The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable [persons] to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Restatement (Second) of Torts § 431 cmt. a (1963-64). For a jury, the term "substantial" in a causation instruction is even more confusing than the term "motivating," and it could be viewed as imposing a heavier burden. See Restatement (Second) of Torts §§ 431, 433 (1963-64) (discussing and defining the term "substantial factor"); W. Page Keeton, *et al.*, Prosser and Keeton on Torts 278 (5th ed. 1984) (discussing the difficulty of using the "substantial cause" test to determine legal or proximate cause). It also creates confusion with the ADA's use of the same term with a different meaning in the requirement that an impairment "substantially limit" a major life activity. 42 U.S.C. § 12102 (2)(A).

We have selected the word "nontrivial" as a substitute for "substantial" and "motivating" in keeping with the definition of substantiality from the Restatement (Second) of Torts, supra, and Justice O'Connor's Price Waterhouse opinion. A search of federal case law did not disclose other uses of "nontrivial" in this context. However it is used here because it provides an appropriately concrete alternate description of this difficult concept

of legal causation.

[20] 42 U.S.C. § 2000e-2(m) (2001) ("even though other factors also motivated the practice").

[21] Fields v. Clark Univ., 966 F.2d 49, 52 (1st Cir. 1992) (Title VII) (Pettine, Sr. Dist. J., D.R.I.) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989) (Title VII) (Brennan, J., plurality)) ("We conclude, instead, that Congress meant to obligate her to prove that the employer relied upon sex-based considerations in coming to its decision.")

[22] Febres v. Challenger Caribbean Corp., 214 F.3d 57, 60 (1st Cir. 2000) (ADEA) (Selya, J.) (Direct evidence of discrimination "shifts the burden of persuasion to the employer, who then must establish that he would have reached the same decision regarding the plaintiff even if he had not taken the proscribed factor into account.")

[23] Another possible defense in cases of age, disability, sex, pregnancy, national origin or religious discrimination would be for the defendant to argue that the challenged characteristic was a "bona fide occupational qualification" ("BFOQ"). See 29 U.S.C. § 623(f)(1) (2001) (allowing BFOQ defense for employment decisions based on age); 42 U.S.C. § 2000e-2(e) (2001) (same for religion, sex, and national origin); 42 U.S.C. § 12113 (2001) (same for disability); see also International Union, United Auto., Aerospace and Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 200-201 (1991) (Title VII) (Blackmun, J.); Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 402-403 (1985) (ADEA) (Stevens, J.); Gately v. Massachusetts, 2 F.3d 1221, 1225-26 (1st Cir. 1993) (ADEA) (Stahl, J.). In order to use the BFOQ defense, the defendant must: 1) "show that the qualification at issue is *reasonably necessary* to the essence of [its] business[;]" and 2) "justify [the] use of [the protected characteristic] as a proxy for that qualification." Gately, 2 F.3d at 1225 (internal citations and quotations omitted). The defendant may justify the use of the protected characteristic as a proxy by either: 1) showing that it had "a *factual basis* for believing[] that all or substantially all persons [with the protected characteristic] would be unable to perform the duties of the job involved[;]" or 2) establishing "that it is impossible or highly impractical to deal with the [employees with the protected characteristic] on an individualized basis." Id. at 1225-26 (internal citations and quotations omitted).

Because of these elements of a BFOQ defense, this instruction is not appropriate for BFOQ cases. More specifically, this instruction is inappropriate for a BFOQ case because it asks the jury to decide what factor or factors motivated the defendant to take the challenged action, whereas the defendant's reliance on the protected characteristic is generally undisputed in a BFOQ case (instead the focus of the dispute is whether the protected characteristic qualifies as a BFOQ).

[24] In Title VII cases, the judge, not the jury, determines the availability of certain remedies when the plaintiff establishes prohibited discrimination and the defendant establishes that it would have taken the same action regardless. See 42 U.S.C. § 2000e-5(g)(2)(B) (2001) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court" may grant declaratory relief, injunctive relief, and attorneys fees, but may not "award damages or issue an order requiring any admission, reinstatement, hiring, [or] promotion."). As discussed in Introductory Note 4, in cases other than Title VII mixed motive cases (e.g., ADEA, Title VII pretext, retaliation) such a showing by the defendant avoids liability altogether.